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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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SUPREME COURT, U.S.

No. 80-6355

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

MUNICIPAL COURT OF CALIFORNIA,
SAN JOSE-MILPITAS JUDICIAL DISTRICT,
Defendant,

DEBRA JEAN MORRIS,
Real Party in Interest
and Appellant.

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ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT DIVISION FOUR

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The appellee moves the court to dismiss the appeal herein, or, in the alternative, to affirm the judgement of the Court of Appeals of the State of California, First Appellate District, Division Four, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to not need further argument.

I.

THE COUNTY ORDINANCE INVOLVED AND THE NATURE OF THE CASE.

A. THE ORDINANCE

This appeal raises the question of the constitutional validity of Santa Clara County Ordinance B13-14 which prohibits so-called "topless" and "bottomless" dancing or displays in restaurants, bars, and other places. The ordinance reads as follows:

"Sec. B13-14. Unlawful exposure of Private Parts.

"(a) Every person, with or without compensation, who acts as a waiter, waitress or entertainer in any establishment which serves food, beverages, or food and beverages, including, but not limited to alcoholic beverages, for consumption on the premises of such establishment; or while participating in any live act, demonstration or exhibition in any public place, place open to the public, or place open to public view, and who performs such activity in the nude, either actually or simulated, is guilty of a misdemeanor.

"'Nude' as used in this section means the simulated, the uncovered, or less than opaquely covered:

"(1) Male or female genitals

"(2) Pubic areas

"(3) Buttocks

"(4) Female breast below a point immediately above the top of the nipple, or

"(5) Female breast with only the nipple and areola covered.

"(b) The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances. A theater, concert hall or other similar establishment means a building, playhouse, room, hall or other place having permanently affixed so arranged that a body of spectators can have an unobstructed view of the stage, upon which theatrical, musical, dramatic, symphonic or other similar forms of artistic expression are presented."

B. THE PROCEEDINGS BELOW

The Appellant, after the effective date of the Santa Clara County Ordinance, was employed by The Hiphugger Bar as a dancer. She was arrested by local county Sheriff deputies for dancing in violation of the standards of County Ordinance B13-14.

Contending that the County Ordinance was constitutionally invalid under both state and Federal standards, the Appellant instituted this action. Appellant began by filing a demurrer to the complaint in the trial court, which was sustained, without leave to amend. The People petitioned the Superior Court of Santa Clara County for a writ of mandate, asking the Superior Court to order the trial court to vacate its order sustaining the demurrer. After a full hearing in Superior Court, that court issued a peremptory Writ of Mandate, ordering the trial court to vacate its order sustaining the demurrer without leave to amend, and to enter an order overruling the demurrer.

Appellant then filed an appeal in the California Court of Appeals, First Appellate District. The Appellate Court affirmed the order of the California Superior Court in an unpublished opinion. Appellant then filed a petition for hearing in the

California Supreme Court, which was denied.

II.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

Appellant's basic contention is that the current published opinion of the California Supreme Court, Crownover v. Musick, 9 C3d 405 (1973), which was the basis for both the California Superior Court and California State District Court of Appeals decision in favor of appellee, is in conflict with decisions of this court, namely, California v. LaRue, 409 US 109(1972) and Doran v. Salem Inn, Inc., 422 US 922(1975). The California Supreme Court apparently did not agree with Appellant's contention as that court refused to grant her request for a hearing.

Appellant would have this court believe that the ordinance in question is overbroad because it purports to regulate "conduct" which is a "communicative expression" protected by the First and Fourteenth Amendments of the United States Constitution. This court has already made clear the standards to apply when such "speech" and "nonspeech" rights overlap. This was done in United States v. O'Brien (1968), 391 US 367. The O'Brien court held that a government regulation is sufficiently justified:

(1) if it is within the constitutional power of the government.

(2) if the government interest is unrelated to the suppression of free expression.

(3) if it furthers an important or substantial government interest.

(4) if the incidental restriction on alleged First Amendment freedoms is no gr ater than is essential to the furtherance of that interest.

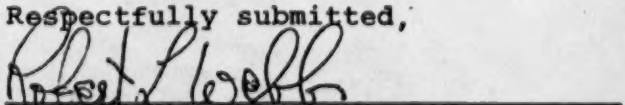
In Crownover, supra, the California Supreme Court held that ordinance of the type involved in these proceedings are constitutional because they regulate mere "conduct", as distinguished from protected speech, and also that such ordinances are constitutional under the O'Brien test even if the conduct they regulate includes a "communicative element" which might in itself be entitled to the protection of the First and Fourteenth Amendments (Id., at pages 426-428).

The Doran court, supra, held that the O'Brien test still remains viable, even though the party entitled to claim its benefit had not done so. Therefore, contrary to Appellant's argument that Crownover is in conflict with opinions of this court, it is obvious that Crownover parallels and is consistent with the reasoning and rationale of both LaRue and Doran.

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgement entered in the cause by the California Court of Appeals, First District, Division Four.

Respectfully submitted,



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